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May 26, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: September 24, 2004

Case Number: TSO-0146

This decision concerns the eligibility of XXXX XXXXX XX(hereinafter referred to as "the Individual") to obtain an access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material."¹

I. BACKGROUND

The present case concerns an Individual who previously held a DOE access authorization for a period of 20 years until he was fired by a DOE contractor (the Contractor) for sexual misconduct in 2000. In 2001, the Individual, now employed by a sub-contractor to the Contractor, sought reinstatement of his DOE access authorization. A background investigation of the Individual ensued and the Individual was required to complete and submit a Questionnaire for National Security Position (QNSP) to the DOE's Local Security Office (LSO). The Individual submitted this QNSP on July 25, 2001. On November 9, 2002, the Individual was arrested for Driving While Intoxicated (DWI), Careless Driving and Fleeing and Evading a Police Officer. On November 15, 2002, an employee of the LSO telephoned the Individual and asked if there had been any changes to the information provided by the Individual in the July 25, 2001 QNSP. The Individual answered "no." On December 2, 2002, the Individual was interviewed by a United States Investigative Service Investigator (the USIS Investigator) as part of the background investigation. In this interview, the Individual allegedly informed the USIS Investigator that he did not have any alcohol related charges or arrests. DOE Exhibit 14 at 4. The Individual's DWI arrest was subsequently detected by the LSO during a search of law enforcement records conducted as part of the Individual's background investigation. Tr. at 133.

¹An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as an access authorization or a security clearance.

A personnel security interview (PSI) of the Individual was conducted on March 6, 2003.² This PSI failed to resolve several security issues. The Individual was then asked to submit to an examination by a DOE Psychiatrist. On May 20, 2003, the DOE Psychiatrist conducted a forensic psychiatric examination of the Individual. In addition to conducting this examination, the DOE Psychiatrist reviewed selected portions of the Individual's security file. On May 27, 2003, the DOE Psychiatrist issued a report in which he stated that the Individual met the criteria for Alcohol Abuse, set forth in Diagnostic and Statistical Manual of Mental Disorders IV-TR (DSM-IV-TR). DOE Psychiatrist's Report of Examination at 19. The DOE Psychiatrist further opined that the Individual was not sufficiently rehabilitated or reformed to resolve the security concerns raised by his alcohol abuse.³

The LSO concluded that the Individual failed to resolve the substantial doubts about his eligibility for a DOE access authorization raised by his alcohol abuse diagnosis, omissions of key facts from information provided to the LSO during his background investigations, and his firing by the Contractor for Sexual Harassment. Accordingly, an administrative review proceeding was initiated. *See* 10 C.F.R. § 710.9. The LSO then issued a letter notifying the Individual that it possessed information that raised a substantial doubt concerning his eligibility for access authorization (the Notification Letter). The Notification letter alleges that the Individual has

(1) Deliberately misrepresented, falsified, or omitted significant information from a . . . Questionnaire for Sensitive (or National Security) Positions, . . . a personnel security interview, written or oral statements made in response to official inquiry on a matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to Sec. 710.20 through Sec. 710.31," 10 C.F.R. § 710.8(f) (Criterion F),

(2) Engaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security . . ." 10 C.F.R. § 710.8(l) (Criterion L),

² The transcript of this PSI appears in the Record as DOE Exhibit 6.

³ The DOE Psychiatrist opined that in order to establish *rehabilitation* from his Alcohol Abuse, the Individual must attend a minimum of 100 hours of Alcoholics Anonymous meetings *and* abstain from the use of alcohol for a minimum of one year. DOE Psychiatrist's Report of Examination at 20. The DOE Psychiatrist opined that in order to establish *reformation* from his Alcohol Abuse, the Individual must either maintain one year of sobriety *or* the Individual must attend a minimum of 100 hours of Alcoholics Anonymous meetings *and* abstain from the use of alcohol for a minimum of one year. DOE Psychiatrist's Report of Examination at 20. (A careful reader might note that these recommendations are inconsistent, but these are the actual recommendations set forth in the DOE Psychiatrist's Report).

(3) Been, or is, a user of alcohol habitually to excess, or has been diagnosed by a board-certified psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse,” 10 C.F.R. § 710.8(j) (Criterion J), and

(4) An illness or mental condition of a nature which, in the opinion of a psychiatrist or licensed clinical psychologist, causes or may cause, a significant defect in judgment or reliability,” 10 C.F.R. § 710.8(h) (Criterion H).

The Individual filed a request for a hearing in which he made a general denial of the allegations contained in the Notification Letter. This request was forwarded to the Director of the Office of Hearings and Appeals (OHA), who appointed me as Hearing Officer.

At the Hearing, the LSO presented two witnesses: the DOE Psychiatrist and the Personnel Security Specialist who was assigned the Individual’s case (the PSS). The Individual presented three witnesses: his wife, a friend and his expert witness, a clinical social worker. The Individual also testified on his own behalf. *See* Transcript of Hearing, Case No. TSO-0146 (hereinafter cited as “Tr.”).

II. STANDARD OF REVIEW

The Hearing Officer's role in this proceeding is to evaluate the evidence presented by the agency and the Individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). The regulations state that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this opinion: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, including knowledgeable participation; the frequency and recency of the conduct; the Individual's age and maturity at the time of the conduct; the voluntariness of the Individual's participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct, the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and exhibits presented by both sides in this case.

III. FINDINGS OF LAW AND FACT

A. Criterion F

On December 2, 2002, the Individual was interviewed by the USIS Investigator as part of the background investigation. The USIS Investigator prepared a written record of this interview, which the DOE has submitted as its Exhibit 14. That record indicates that the Individual informed the USIS Investigator that he did not have any alcohol-related charges or arrests. DOE Exhibit 14 at 4.

The Record shows that less than a month before the USIS Investigator interviewed the Individual, on November 9, 2002, the Individual was arrested for Driving While Intoxicated (DWI), Careless Driving and Fleeing and Evading a Police Officer.

At the Hearing, the Individual repeatedly testified that the USIS Investigator had only asked him if he had ever been convicted of a felony. Tr. at 9, 11-12, 24-25, 63-65. He further testified “at no point during this thing, that I can remember, did [the USIS Investigator] ever ask me if I had ever been arrested of [sic] alcohol-related incidents.” Tr. at 9.

I find the Individual’s testimony that the USIS Investigator did not ask him if he had ever been arrested or charged in connection with an alcohol-related incident lacks credibility. The USIS Investigator’s Report clearly states that the Individual has “no alcohol-related charges or arrests.” DOE Exhibit 14 at 4. More importantly, the Individual’s statements during the his PSI cast grave doubts about his credibility on this issue. During his PSI, he was questioned about his failure to report his DWI to the USIS Investigator. Specifically, the PSS asked: “What about an interview you had with an . . . investigator on December 2nd, [in which] he specifically asked you, ‘have you ever had any alcohol-related charges or incidents.’ and you said, ‘No?’” The Individual responded by stating “And I said no.” PSI at 63. When the PSS first asked the Individual why he did not inform the USIS Investigator of the November 9, 2002 DWI arrest, the Individual responded by claiming he did not need to inform the USIS Investigator about the DWI arrest because he had not yet been convicted of that offense. PSI at 72-73. The PSS then asked the Individual whether the USIS Investigator had specifically asked him if he had ever been arrested. The Individual responded by stating: “Mm. He might have, I don’t, I don’t know.” PSI at 74. The PSS subsequently asked the Individual: “And you were under the impression that you didn’t have to reply, uh, truthfully to an investigator just because you thought you were innocent, even though you had – been arrested and charged with an alcohol-related incident?” The Individual then responded: “But I, I was not convicted. He was asking me if I ever had been convicted. I, I, I’ve never–.” PSI at 77. I find the USIS Investigator’s Report more credible than the Individual’s testimony that the USIS Investigator never asked him about alcohol-related charges or arrests. I therefore find that the LSO properly invoked Criterion F.

The Notification Letter also contends that the Individual submitted an updated QNSP on November 15, 2002, in which the Individual allegedly failed to report the November 9, 2002 arrest for DWI. However, the Record clearly shows that the Individual did not himself submit an updated QNSP as the Notification Letter asserts. On July 25, 2001, the Individual submitted a QNSP to the DOE’s Local Security Office (LSO). On November 15, 2002, an employee of the LSO (the LSO Employee) telephoned the Individual and asked if there had been any changes to the information provided by the Individual in the July 25, 2001 QNSP. The Individual indicates he answered “No.” Tr. at 56. The LSO Employee apparently signed her name to and dated the QNSP on the Individual’s behalf.

Among the many questions contained in the QNSP were two questions relevant to the present case. QNSP Question 23c asks “Are there currently any charges pending against you for any criminal offense?” The QNSP submitted by the Individual on July 25, 2001 correctly answered this question

“No.” QNSP Question 23d asks “Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?” The QNSP submitted by the Individual on July 25, 2001 correctly answered this question “No” as well. However, when the Individual was contacted by the LSO Employee and asked if there had been any changes in the information provided in the July 25, 2001 QNSP, the Individual should have informed the LSO Employee of the November 9, 2002 DWI arrest. As a former DOE access authorization holder (from 1980 to 2000), the Individual should have been well aware of both his continuing obligation to inform DOE of any alcohol-related arrests and the DOE’s interest in being apprised of any and all alcohol-related arrests. *See* Tr. at 132 (testimony of Personnel Security Specialist). The Individual acknowledged that as a clearance holder he would have an affirmative obligation to report any alcohol-related arrests. But the Individual claimed that as a clearance applicant, he was under no obligation to do so. Tr. at 11, 26-27. This claim, in and of itself, demonstrates both poor judgment on the part of the Individual and his intention to deceive DOE security officials.

A finding of derogatory information does not, however, end the evaluation of evidence concerning the individual’s eligibility for access authorization. *See Personnel Security Hearing (Case No. VSO-0244)*, 27 DOE ¶ 82,797 (affirmed by OSA, 1999); *Personnel Security Hearing (Case No. VSO-0154)*, 26 DOE ¶ 82,794 (1997), *aff’d*, *Personnel Security Review (Case No. VSA-0154)*, 27 DOE ¶83,008 (affirmed by OSA, 1998). In the end, like all Hearing Officers, I must exercise my common sense judgment in determining whether an individual’s access authorization should be restored after considering the applicable factors prescribed in 10 C.F.R. § 710.7(c). Therefore, I must consider whether the Individual has submitted sufficient evidence of mitigation to resolve the security concerns raised by his omission. Since the Individual continues to maintain that he did not provide the USIS Investigator with misleading information, in spite of overvaluing evidence to the contrary, I find that he has not. Therefore, the security concerns set forth in the Notification Letter under Criterion F remain unresolved.

B. Criterion L

The Notification Letter indicates that the Individual was terminated by the Contractor for Sexual Misconduct on September 1, 2000. Statement of Charges ¶ III. The Individual asserts that he never did anything inappropriate and that his termination occurred even though the Contractor’s investigations of the allegations against him were inconclusive. Tr. at 21, 49, 62. The Individual also contends that the allegations of one of his accusers could not be relied upon because she had a previous history of lying during the investigations of the Individual’s alleged sexual misconduct. Tr. at 62, 65. However, the evidence in the Record belies those contentions. It shows that the Contractor conducted at least three investigations into sexual misconduct allegations concerning the Individual. One of these investigations revealed evidence that the Individual had engaged in an improper sexual relationship with a subordinate.

i. The First Investigation

In his previous job, the Individual was a lead technician at a facility that was managed and operated by the Contractor. In June 1997, 11 employees complained to the Contractor's management that the Individual was giving preferential treatment to a female employee (Employee A) with whom, the employees alleged, the Individual was having an affair. DOE Exhibit 16 at 2. The Contractor conducted an investigation of these allegations in which both the Individual and Employee A were interviewed and denied that they were having a sexual relationship. *Id.* The Contractor found the evidence collected during the investigation to be inconclusive. *Id.*

ii. The Second Investigation

In early 1999, another female employee (Employee B) complained to the Contractor's management that she had been sexually harassed by the Individual. The Contractor conducted an investigation of Employee B's complaint and determined it was unfounded. In June 1999, Employee B filed sexual harassment complaints against the Contractor and the Individual with federal and state agencies. These lawsuits were eventually settled and their records were sealed by order of the presiding federal judge.

iii. The Third Investigation

Sometime in 1999, Employee A complained, to the Contractor's management, that the Individual had sexually harassed her. On March 24, 2000, Employee A contacted an employee of the Contractor's Human Relations staff and asked to meet with her. On that date, Employee A provided the Contractor with a six-page written statement.⁴ In this statement, Employee A indicated that she had engaged in a sexual relationship with the Individual from the end of 1995 until spring 1997.⁵ March 24, 2004 Statement at 1-2. According to Employee A, she and the Individual had sexual relations on six occasions during this period. Exhibit 50 to Deposition of Employee A at 1-2. Employee A further alleged that the Individual frequently pressured and coerced her to continue this relationship. Exhibit 50 to Deposition of Employee A at 2. In this Statement, Employee A admitted that she had lied during the 1997 investigation when she had claimed that her relationship with the Individual was platonic. *Id.* at 2-3. Employee A also admitted that she had lied to a Contractor management team member who had previously asked her if she had a sexual relationship with the

⁴ On May 7, 1999, Employee A had provided the Contractor with a written statement in which she made a number of statements whose obvious purpose was to support Employee B's complaints against the Individual. However, this statement does not contain any allegations that Employee A had a sexual relationship with the Individual. Exhibit 50 to Deposition of Employee A.

⁵ Employee A's decision to contact the Contractor's Human Relations Office apparently occurred at the urging of a psychologist employed by the Contractor's Employee Assistance Program. Deposition of Employee A at 70-71, 85.

Individual. *Id.* at 4-5. According to Employee A, she had previously denied having a sexual relationship with the Individual because she wished to protect her marriage and because she was afraid of the Individual. *Id.* at 4-5. Employee A also admitted that, in order to support Employee B's complaints against the Individual, she had supplied Employee B with numerous love letters and cards sent to Employee A by the Individual, with the understanding that Employee B would claim that the Individual sent the love letters and cards to Employee B. *Id.* at 5. Employee A repeated these admissions during an October 16, 2000 deposition taken during the discovery phase of Employee B's federal lawsuit. Deposition of Employee A at 28-33.

After it received Employee A's March 24, 2000 six-page statement, the Contractor assigned an employee of its Staff Relations Office (the SRO Investigator) to conduct an investigation of her allegations against the Individual. At the conclusion of this investigation, the SRO Investigator issued a memorandum in which he stated that the Individual had "pressured, coerced or threatened [Employee A] into having or continuing a sexual relationship" while the Individual was Employee A's supervisor. DOE Exhibit 16 at 4. The SRO Investigator also found that Employee A had lied to the Contractor on at least two previous occasions, first, when she had denied knowledge of the love letters and cards she had provided Employee B with, and second, when she had previously denied having a sexual relationship with the Individual. The Individual was terminated by the Contractor on September 1, 2000. The final termination letter stated in pertinent part:

The information gathered during the [SRO Investigator's] investigation showed that you engaged in an inappropriate relationship with the female subordinate while you were her supervisor, and you misled . . . staff in previous inquiries. The information also supported the allegation that you pressured, coerced, or threatened this female subordinate into having or continuing a sexual relationship.

DOE Exhibit 12 at 1.

The Individual correctly contends that Employee A's provision of the love letter and cards to Employee B and the inconsistencies between Employee A's previous statements to investigators and her March 24, 2000 Statement detract from the credibility of her allegations against him. Nevertheless, I find Employee A's March 24, 2000 statement and her deposition testimony to be credible. Conversely, I have great difficulty believing the Individual's testimony on this subject, for several reasons. At the Hearing, the Individual's testimony appears to have shaded the truth concerning these issues. For example, the Individual testified that the initial investigation of his relationship with Employee A resulted from the complaints of one disgruntled employee, when other evidence in the Record shows that 11 employees complained about his relationship with Employee A. Another example of the Individual's willingness to shade the truth was his repeated testimony that each of the investigations conducted by Contractor into his alleged sexual misconduct were inconclusive. Tr. at 21, 49, 65-66. When in fact, one such investigation found he had engaged in an improper sexual relationship with a subordinate.

Moreover, the Individual claims he and Employee A only had sex once, in 1998, after he was no longer her supervisor. The sheer number of love letters and cards the Individual sent, which appear in the Record as Exhibit 53 to Employee A's Deposition, suggest a more extensive sexual involvement than the one-time affair the Individual reported. The cards and letters, some of which contain comments that are inconsistent with a platonic relationship, obviously span a period of years since they include a number of holidays, two Valentines Days and three birthdays. Finally, the Individual's testimony concerning his failure to report his arrest to the USIS Investigator, which I have discussed above at Part A of this decision, makes it more difficult for me to conclude that his testimony concerning the sexual harassment allegations is credible.⁶

Information indicating that an individual sexually harassed a fellow employee, and then repeatedly lied about his actions, raises grave security concerns under Criterion L. Such conduct, shows a disregard for law, an inability or unwillingness to adhere to rules and regulations, an inability to exercise good judgment and an inability to control one's impulses. Accordingly, the LSO properly invoked Criterion L. Since the Individual still asserts that the sexual misconduct never occurred, there is no evidence that the security concerns raised by the Individual's misconduct have been mitigated by time, counseling or any other factor.

C. Criteria J and H

A reliable diagnosis of alcohol abuse raises significant security concerns under Criteria J and H. In other DOE security clearance proceedings, Hearing Officers have consistently found that a diagnosis related to excessive alcohol use raises important security concerns. *See, e.g., Personnel Security Hearing*, Case No. VSO-0079, 25 DOE ¶ 82, 803 (affirmed by OSA, 1996); *Personnel Security Hearing*, Case No. VSO-0042, 25 DOE ¶ 82,771 (1995) (affirmed by OSA, 1996); *Personnel Security Hearing*, Case No. VSO-0014, 25 DOE ¶ 82,755; *aff'd, Personnel Security Review*, 25 DOE ¶ 83,002 (affirmed by OSA, 1995). In these proceedings, it was recognized that an individual's excessive use of alcohol might impair his judgment and reliability, and his ability to control impulses. These factors amplify the risk that an individual will fail to safeguard classified matter or special nuclear material.

In the present case, the Individual does not contest the DOE Psychiatrist's diagnosis of alcohol abuse. Therefore, the only issue before me is whether the Individual has submitted sufficient evidence of rehabilitation and reformation to resolve the security concerns raised by his alcohol abuse. After considering all of the evidence in the record, I find that he has done so.

By the time of the hearing, the Individual had taken a number of important steps in order to address his alcohol abuse. Specifically, the Record indicates that, at the time of the Hearing, the Individual

⁶ The USIS Investigator's Report indicates that the Individual told him that the Contractor "determined that it was [the Individual's] word versus [Employee A's] word that he had harassed her. As a result, [the Contractor] considered [the Individual] to be a liability and he was terminated." DOE Exhibit 14 at 2.

had not consumed alcohol since he was arrested for DWI on November 9, 2002, over two years prior to the Hearing. Tr. at 13, 32. The Individual also testified that he had completed court-mandated alcohol education and anger management classes. Tr. at 36.

Most importantly, the testimony of the DOE Psychiatrist convinced me that the Individual is sufficiently reformed to resolve the security concerns raised by the Individual's alcohol abuse. The DOE Psychiatrist remained in the hearing room and observed the testimony of the Individual and the other witnesses. The DOE Psychiatrist was then called to the stand. At this point the DOE Psychiatrist testified that, in his opinion, the Individual had shown that he had been sufficiently reformed. Tr. at 166.

I found the DOE Psychiatrist's testimony to be credible and entitled to great weight. I therefore conclude that the Individual has resolved the security concerns raised by his diagnosis of Alcohol Abuse.

IV. CONCLUSION

For the reasons set forth above, I conclude that the Individual has resolved the security concerns raised under Criteria J and H. However, the Individual has not resolved the security concerns raised under Criteria F and L. Therefore, the Individual has not demonstrated that restoring his security clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, it is my opinion that the Individual should not be granted an access authorization. The Individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Steven L. Fine
Hearing Officer
Office of Hearings and Appeals

Date: May 26, 2005